

1 Michael A. Isaacs, State Bar No. 99782
2 Jeffrey L. Fillerup, State Bar No. 120543
3 Nhung Le, State Bar No. 209552
4 LUCE, FORWARD, HAMILTON & SCRIPPS LLP
5 Rincon Center II, 121 Spear Street, Suite 200
6 San Francisco, California 94105-1582
7 Telephone No.: 415.356.4600
8 Fax No.: 415.356.4610
9 E-Mail: misaacs@luce.com
10 jfillerup@luce.com
11 nle@luce.com

12 Attorneys for Appellee JANINA M. ELDER,
13 Chapter 11 Trustee

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN FRANCISCO DIVISION

17 PATRICIA ISABELLE HEWLETT,
18 Appellant,
19 v.
20 JANINA M. ELDER, Trustee,
21 Appellee.

Case No. 07 CV 05883 CRB

**SUPPLEMENT TO APPELLEE'S
COUNTER-DESIGNATION OF RECORD
ON APPEAL**

22 Appellee Janina M. Elder, Chapter 11 Trustee in Bankruptcy (the "Trustee"), hereby files
23 this Supplement to Appellee's Counter-Designation of Record on Appeal, as follows:

24 On November 21, 2007, the Trustee filed in the Bankruptcy Court "Appellee's Counter-
25 Designation of Record on Appeal." On December 18, 2007, the Trustee filed in the Bankruptcy
26 Court certain hearing transcripts that were noted in the Trustee's November 21, 2007 Counter-
27 Designation, but which were not available to the Trustee to submit to the Court on November 21.
28 Those hearing transcripts were submitted to the Bankruptcy Court on December 18.

The Trustee hereby submits this supplemental designation of certain pleadings, orders, and transcripts that were not included in the original designation dated November 21, 2007, along with copies of the pleadings, orders and transcripts designated herein.

BANKRUPTCY COURT PLEADINGS

DOCKET NO.	DATE FILED/DATE OF HEARING	DESCRIPTION OF DOCUMENT	DESCRIPTION OF EXHIBITS
277	Filed: November 19, 2007 Heard: November 29, 2007	Notice of Motion and Motion for Relief from Order or in the Alternative for Stay of Order Pending Appeal	N/A
278	Filed: November 19, 2007 Heard: November 29, 2007	Notice of Motion and Motion for Relief from Order or in the Alternative for Stay of Order Pending Appeal (Notice of Hearing)	
279	Filed: November 19, 2007 Heard: November 29, 2007	Memorandum of Points and Authorities Re: Alternative Motions for Relief of Stay	N/A
284	Filed: November 26, 2007 Heard: November 29, 2007	Opposition to Ms. Hewlett's Motion for Relief Under Rule 60(b)(3), or Motion to Stay Pursuant to Rule 8005	N/A
285	Filed: November 26, 2007 Heard: November 29, 2007	Declaration of Jeffrey L. Fillerup in Opposition to Ms. Hewlett's Motion for Relief Under Rule 60(b)(3), or Motion to Stay Pursuant to Rule 8005	Exh. 1 Order Denying Petition of Writ of Mandamus

BANKRUPTCY COURT ORDERS

DOCKET NO.	DATE FILED/DATE OF HEARING	DESCRIPTION OF DOCUMENT	DESCRIPTION OF EXHIBITS
297	Hearing: November 29, 2007 Order Entered: December 13, 2007	Order Denying Motion for Stay Pending Appeal	N/A

HEARING TRANSCRIPTS

DATE OF HEARING	DESCRIPTION OF HEARING
November 29, 2007	Motion for Relief from Order or in the Alternative for Stay or Order Pending Appeal

DATED: December 26, 2007

LUCE, FORWARD, HAMILTON & SCRIPPS LLP

By: 

Jeffrey L. Fillard
Attorneys for Appellee JANINA M. ELDER,
Chapter 11 Trustee

301024986.1

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JAMES ATTRIDGE (SBN# 124003)
1390 Market Street, Suite 1204
San Francisco, CA 94102
Telephone: (415) 552-3088
Facsimile: (415) 522-0513
Email: jattridge@attridgelaw.com

Attorney for PATRICIA HEWLETT

FILED

NOV 19 2007

UNITED STATES BANKRUPTCY COURT
SAN FRANCISCO, CA

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In Re:

CASE NO.06-30904

CHAPTER 11

SOPHIE H.NG.

**Notice of Motion and Motion for Relief from
Order or in the Alternative for Stay of Order
Pending Appeal**

Debtor

Date: November 29, 2007
Time: 10:30 AM
Place: Courtroom 23

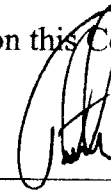
TO: Janina Elder, Trustee, and to Luce, Forward, Hamilton & Scripps, her counsel
of record: NOTICE IS HEREBY GIVEN THAT ON NOVEMBER 29, 2007 or as soon
thereafter as the matter can be heard in Courtroom 23 of the above-entitled court located at
235 Pine Street, San Francisco, California, Patricia Hewlett will, and hereby does move
this Court for an Order relieving her from the Turnover Order of this court issued on
September 28, 2007. In the alternative, Ms. Hewlett moves for an Order Staying the
Turnover Order of September 28, 2007 until the District Court rules on the appeal of that
order, said appeal having been filed on November 5, 2007.

Said alternative motions will be made on the grounds that the Trustee's failure to

1 provide notice of the motions which resulted in said order constitutes an innocent
2 misrepresentation or accidental omission warranting relief from said order pursuant to
3 FRCP 60)b)3) or 60)b)6); or that a stay is warranted by the terms of FRBP 8005.

4 This motion is based upon this notice of motion, on the memorandum of points and
5 authorities filed and served along herewith, and on the request for judicial notice of the
6 Petition for Writ of Mandamus to Vacate Order Rejecting Lease and Ejecting Petitioner
7 from the Premises and Declaration of James Attridge in Support thereof filed October 30,
8 2007 in the United States District Court and served on this Court that same date.

9 Dated November 19, 2007




James Attridge

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JAMES ATTRIDGE (SBN# 124003)
1390 Market Street, Suite 1204
San Francisco, CA 94102
Telephone: (415) 552-3088
Facsimile: (415) 522-0513
Email: jattridge@attridgelaw.com

Attorney for PATRICIA HEWLETT

FILED 
NOV 19 2007
UNITED STATES BANKRUPTCY COURT
SAN FRANCISCO, CA

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In Re:

SOPHIE H. NG.

Debtor

CASE NO.06-30904

CHAPTER 11

**Notice of Motion and Motion for Relief from
Order or in the Alternative for Stay of Order
Pending Appeal**

Date: November 29, 2007
Time: 10:30 AM
Place: Courtroom 23

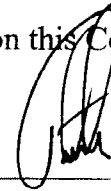
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1 provide notice of the motions which resulted in said order constitutes an innocent
2 misrepresentation or accidental omission warranting relief from said order pursuant to
3 FRCP 60)b)3) or 60)b)6); or that a stay is warranted by the terms of FRBP 8005.

4 This motion is based upon this notice of motion, on the memorandum of points and
5 authorities filed and served along herewith, and on the request for judicial notice of the
6 Petition for Writ of Mandamus to Vacate Order Rejecting Lease and Ejecting Petitioner
7 from the Premises and Declaration of James Attridge in Support thereof filed October 30,
8 2007 in the United States District Court and served on this Court that same date.

9 Dated November 19, 2007



James Attridge

279

FILED 

NOV 19 2007

UNITED STATES BANKRUPTCY COURT
SAN FRANCISCO, CA

JAMES ATTRIDGE (SBN# 124003)
1390 Market Street, Suite 1204
San Francisco, CA 94102
Telephone: (415) 552-3088
Facsimile: (415) 522-0513
Email: jattridge@atridgelaw.com

Attorney for PATRICIA HEWLETT

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In Re:

CASE NO.06-30904

CHAPTER 11

SOPHIE H.NG.

**Memorandum of Points and Authorities Re:
Alternative Motions for Relief and Stay**

Debtor

Date: November 29, 2007
Time: 10:30 AM
Place: Courtroom 23

Facts

On September 28, 2007 Court issued a turnover order which effectively barred Patricia Hewlett from access to 1385 Clay Street, San Francisco, unit 3 despite the fact she had signed a five year lease entitling her to occupancy through May, 2009. Notice of that motion was served upon Ms. Hewlett's counsel solely by means of filing through the bankruptcy court's e-filing program. Given that counsel for Ms. Hewlett was not a participant in that program, this amounted to no service at all. Counsel for the Trustee had always previously served Hewlett's counsel by means of mail, personal service, facsimile,

1 or a combination of them. Counsel appeared at the hearing because other matters were set
 2 to be discussed and advised the court he had not been served. The Court was unmoved and
 3 granted the motion despite the explained lack of service.

4 On October 30, 2007 a petition for extraordinary relief was filed at the United
 5 States District Court, which was denied because there was an insufficient showing that the
 6 heightened clearly erroneous standard was satisfied.

7 On November 14, 2007 the United States Court of Appeals, Ninth Circuit ruled as a
 8 matter of first impression that "justice suffers" when a motion is granted when a non-e-
 9 filer served by e-filing only, and not with any sort of hard copy. *Calderon v. IBEW Local*
 10 *47 No 05-56937*.

11 Legal Standard

12 Federal Rule of Civil Procedure 60b)3) provides that a Court should relieve a party
 13 from a final order which results from the misconduct of an adverse party. FRCP 60 b)3) is
 14 a remedial rule which should be liberally construed. *Rozier v. Ford Motor Company* 573
 15 *F.2d 1332 (5th Cir. 1978)* The rule is aimed at judgments which are unfairly obtained, not
 16 at those which are factually incorrect. *In Re: M/V Peacock on Complaint of Edwqrds* 809
 17 *F.2d 1403, 1405 (9th Cir. 1987)* Misconduct under FRCP 60 b)3) embraces innocent
 18 misrepresentations *United States v. One Douglas A-26B Aircraft* 662 *F.2d 1372,1374-1375*
 19 *(11th Cir. 1981)* and accidental omissions. *Jones v. Aero/Chem Corp* 921 *F.2d 875, 879 (9th*
 20 *Cir. 1990)*

21 Bankruptcy Court Rule 8005 holds that motions for stay pending appeal should be
 22 granted upon a showing of a likelihood of success on the merits.

23 Argument

24 Viewing the evidence in the light most favorable to the non-moving party (as well
 25 as the most likely) somebody made a mistake in haste and did not properly notice Ms.
 26 Hewlett's counsel with Notice of the Motions to be heard on September 28, 2007.
 27 Applying rule 60 b)3) as interpreted above those orders should all be vacated and the
 28 motions held in abeyance until counsel for Ms. Hewlett has reviewed them and filed briefs

1 in opposition.

2 In light of the forceful language in *Calderon* arising in a very similar scenario the
3 likelihood that the Order will be stayed at least through a remand and directive for
4 rehearing is as certain as the next sunrise. Moreover, an examination of the authorities
5 cited to the District Court in support of the petition for writ of mandate, show that while
6 this court's order might not be clearly erroneous as a matter of law, neither is it likely to
7 stand up to de novo review.

8 November 19, 2007

A handwritten signature in black ink, appearing to read 'James Attridge', is written over a horizontal line.

James Attridge

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1 Michael A. Isaacs, State Bar No. 99782
Jeffrey L. Fillerup, State Bar No. 120543
2 Nhung Le, State Bar No. 209552
LUCE, FORWARD,
3 HAMILTON & SCRIPPS LLP
Rincon Center II, 121 Spear Street, Suite 200
4 San Francisco, California 94105-1582
Telephone No.: 415.356.4600
5 Fax No.: 415.356.3895
E-mail: misaacs@luce.com
6 jfillerup@luce.com
nle@luce.com
7

8 Attorneys for
JANINA M. ELDER, Chapter 11 Trustee
9

10 UNITED STATES BANKRUPTCY COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 In re

14 SOPHIE NG,

15 Debtor.

Case No. 06-30904 TEC

Chapter 11

Hon. Thomas E. Carlson

16 **OPPOSITION TO MS. HEWLETT'S**
17 **MOTION FOR RELIEF UNDER RULE**
18 **60(b)(3), OR MOTION TO STAY**
19 **PURSUANT TO RULE 8005**

20 Date: November 28, 2007

Time: 10:00 a.m.

Place: 235 Pine Street

Courtroom 23

San Francisco, CA

Chapter 11 Bankruptcy Trustee Janina M. Elder ("Trustee") hereby opposes Patricia Hewlett's motion for relief from the Court's September 28, 2007 order under Federal Rule of Civil Procedure 60(b)(3), or in the alternative, motion to stay under Bankruptcy Rule 8005, as follows:

I. MS. HEWLETT HAS NOT SATISFIED THE REQUIREMENTS OF RULE 60(b)(3)

On August 3, 2007, the Court heard and granted the Trustee's motion to sell an asset of the bankruptcy estate, a 24-unit apartment located at 1385 Clay Street, San Francisco, California (the "Clay Property"), under Section 363(f). (Fillerup Decl., par. 2) Ms. Hewlett opposed the Trustee's 363(f) motion, her counsel appeared at the August 3 hearing, and the Court granted the Trustee's motion to sell the property notwithstanding Ms. Hewlett's opposition and objection. (Fillerup Decl., par. 3)

At hearings on September 14, 2007 and September 21, 2007, the Court granted the Trustee's request for approval to sell the Clay Property to A.J. Batt for \$4.6 million (the "Batt Sale"). (Fillerup Decl., par. 3) Ms. Hewlett's counsel appeared at both hearings and opposed the proposed sale to Mr. Batt. The Court approved the sale notwithstanding Ms. Hewlett's opposition and objection. The Batt Sale included a condition that the Trustee obtain an order removing Ms. Hewlett from the Clay Property. (Fillerup Decl., par. 3)

On September 19, 2007, the Trustee filed a motion to remove Ms. Hewlett from the Clay Property. This motion was made in order to satisfy a condition of the Batt Sale. Ms. Hewlett's counsel appeared at the September 28, 2007 hearing of the motion to remove Ms. Hewlett from the Clay Property and opposed the motion. (Fillerup Decl., par. 5) Ms. Hewlett's opposition was overruled, and the Court granted the Trustee's motion and ordered Ms. Hewlett to vacate the premises and turn over possession of the Clay Property to the Trustee (the "September 28 Order"). The Court issued an order that day, and Ms. Hewlett's counsel was served with the September 28 Order that day, September 28, 2007. (Fillerup Decl., par. 5)

Seven weeks later, after the Trustee had already sold the Clay Property to Mr. Batt, Ms. Hewlett filed this motion seeking an order setting aside the September 28 Order based on Federal

1 Rule of Civil Procedure 60(b)(3). (Fillerup Decl., par. 8) Ms. Hewlett's Rule 60(b)(3) motion
2 should be denied for several reasons.

3 First, the motion is not timely. While there is a one-year statute of limitations for filing
4 a motion under Rule 60(b)(3), a motion should be denied as untimely even if it is filed within the
5 one-year period when the motion could have been made earlier and if the opposing party will be
6 prejudiced by the tardy filing. *In re Leisure Corp.*, 2007 U.S. Dist. Lexis 16231 (N.D. Cal. 2007);
7 *Immerson Corp. v. Sony Computer Ent. America Inc.*, 2006 U.S. Dist. Lexis 13697 (N.D. Cal.
8 2006). In this case, Ms. Hewlett could have filed the motion before the Trustee sold the Clay
9 Property. Now that the Trustee has sold the Clay Property, the Trustee no longer owns the
10 property and the Trustee is not able to return possession of the property to Ms. Hewlett.
11 Furthermore, the Trustee and creditors would be prejudiced if the Batt Sale could be reversed by
12 returning possession of the property to Ms. Hewlett (which is not possible at this point).

13 Second, Federal Rule 60(b)(3) requires that the moving party prove fraud by the
14 opposing party by "clear and convincing" evidence. *Immerson Corp. v. Sony Computer Ent.*
15 *America Inc.*, 2006 U.S. Dist. Lexis 13697 (N.D. Cal. 2006). A party moving for relief under
16 Rule 60(b)(3) must: "(1) prove through clear and convincing evidence that the verdict was
17 obtained through fraud, misrepresentation, or other misconduct [and] (2) establish that the
18 conduct complained of prevented the losing party from fully and fairly presenting his case or
19 defense." Ms. Hewlett has failed to adduce evidence of either requirement. She has not
20 produced evidence of fraud. She has not produced evidence that she would have prevailed if she
21 had offered a complete opposition to the Trustee's motion. In order to satisfy the second
22 requirement, Ms. Hewlett must submit proof that her opposition to the Trustee's motion to remove
23 Ms. Hewlett would have been successful, which she has not done.

24 Third, a court should not set aside an order because of mistakes or poor judgment by the
25 moving party. *E.g., Latshaw v. Trainer Wortham & Co., Inc.*, 452 F.3d 1097 (9th Cir. 2006).
26 In this case, Ms. Hewlett failed to move for reconsideration of the September 28 Order, or to
27 appeal the September 28 Order in a timely manner, or to seek an immediate stay of the order.
28 Instead of filing a notice of appeal within the required 10-day period, Ms. Hewlett filed a

1 complaint against the Trustee with the San Francisco Rent Control Board, (Fillerup Decl., par. 9),
 2 which was an improper procedure and a violation of the automatic bankruptcy stay. That
 3 complaint was dismissed by the Rent Control Board soon after it was filed. Ms. Hewlett then
 4 filed a petition for a writ of mandamus with the District Court. The writ petition asked the
 5 District Court to overrule the September 28 Order because there had been insufficient service of
 6 the Trustee's motion. On October 31, 2007, Judge Breyer issued an order denying Ms.
 7 Hewlett's writ petition. (Fillerup Decl., Ex. 1) After failing to file a timely notice of appeal and
 8 after seeking relief from the Rent Control Board and the District Court, Ms. Hewlett has returned
 9 to this Court for relief. This Court should not grant Ms. Hewlett's relief because she erred in
 10 seeking relief from tribunals that would not or could not provide the relief she sought.

11 In conclusion, Ms. Hewlett's motion should be denied because (i) she has failed to satisfy
 12 the grounds for relief under Rule 60(b)(3), (ii) the Trustee and creditors would be prejudiced by
 13 Ms. Hewlett's delay in setting aside the September 28 Order, and (iii) the Trustee is unable to
 14 restore possession of the Clay Property to Ms. Hewlett because the Clay Property has been sold to
 15 Mr. Batt and the Trustee no longer has possession of the property.

16 **II. MS. HEWLETT HAS NOT ESTABLISHED THE REQUIREMENTS FOR A STAY**

17 **A. Ms. Hewlett Cannot Establish Irreparable Harm**

18 The September 28 Order became effective immediately when it was entered on September
 19 28, 2007. Ms. Hewlett did not seek to stay the order at the time of the hearing on September 28,
 20 2007, and she never sought a stay from this Court until November 16, 2007, when Ms. Hewlett's
 21 counsel filed a motion to stay the order. (Fillerup Decl., par. 8) By the time Ms. Hewlett had
 22 filed this motion to stay the September 28 Order, the Trustee has already closed on the sale of the
 23 Clay Property to Mr. Batt. (Fillerup Decl., par. 8)

24 According to Bankruptcy Rule 8005, a motion to stay an order issued by the Bankruptcy
 25 Court should first be made to the Bankruptcy Court. The Bankruptcy Court evaluates the merits
 26 of a motion to stay under the same standards applicable to a motion for a preliminary injunction.

27 *Oakland Tribune, Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985). The
 28 "motion for stay" standard is identical to the standard for assessing whether a preliminary

injunction should issue. *In re PGE*, 2002 U.S. Dist. Lexis 27549 (N.D. Cal. 2002). That is, the moving party must establish that she will suffer irreparable harm if the stay is not issued. *Id.* If the moving party establishes irreparable harm, then the Bankruptcy Court will determine whether the moving party has established a likelihood of success on the merits, and whether the non-moving party will be harmed by the proposed stay order. If the moving party fails to establish the first part of the test by not establishing irreparable harm, then the court “need not decide whether [movants are] likely to succeed on the merits.” *Oakland Tribune, Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985); *Pon v. Silicon Valley Bank*, 1994 U.S. Dist. Lexis 2559 (N.D. Cal. 1994).

Here, Ms. Hewlett has not established that she will suffer irreparable harm unless a stay is issued. Ms. Hewlett cannot satisfy this part of the “motion to stay” test because by the time Ms. Hewlett first asked this Court to stay the September 28 Order the Trustee had already sold the Clay Property to Mr. Batt. (Fillerup Decl., par. 8)

Also, Ms. Hewlett cannot show irreparable injury because the Court has allowed her to seek money damages from the Trustee based on her proof of claim. When money damages are available, then irreparable harm cannot be established as a matter of law. *E.g.*, *L.A. Memorial Coliseum Commission v. NFL*, 634 F.2d 1197 (9th Cir. 1980).

Because Ms. Hewlett cannot show irreparable harm, the motion to stay should be denied and the Court need not consider the other aspects of the “motion to stay” test.

B. Ms. Hewlett Cannot Establish a Likelihood of Success on the Merits

Even if Ms. Hewlett could establish irreparable harm, her motion to stay should be denied because she cannot establish a likelihood that she would prevail on the merits of her appeal to the District Court. *Mount Graham Coalition v. Thomas*, 89 F.3d 554 (9th Cir. 1996) (motion for stay denied when it failed to raise serious questions on the merits). Ms. Hewlett will not prevail on her appeal for several reasons, which are discussed in the sub-sections below.

1. An Appeal of the September 28 Order is Untimely

Pursuant to Bankruptcy Rule 8001, the notice of appeal from a Bankruptcy Court order must be filed within 10 days from the Bankruptcy Court’s entry of the order. In this case, Ms.

1 Hewlett's time to appeal expired on October 9, 2007, which was 10 days after the entry of the
 2 September 28 Order. The 10-day period for filing a notice of an appeal from a Bankruptcy Court
 3 order is jurisdictional, and the 10-day time period is strictly construed. If the filing deadline is not
 4 satisfied, the untimely appeal will be dismissed because the district court will lack jurisdiction to
 5 hear the appeal. *See, e.g., Morn v. Strauss*, 1996 U.S. Dist. Lexis 12021 (N.D. Cal. 1996).

6 Ms. Hewlett cannot show a likelihood of success on the merits of her appeal because the
 7 appeal will be dismissed as untimely. Ms. Hewlett did not file her notice of appeal until
 8 November 5, 2007, over one month after entry of the September 28 Order.

9 **2. Judge Breyer's Order is Law of the Case**

10 Instead of filing a timely notice of appeal of the September 28 Order, Ms. Hewlett chose
 11 to file a petition for a writ of mandamus in the District Court. Judge Breyer denied the petition
 12 and in so doing he found that Ms. Hewlett had actual notice of the hearing and was present at the
 13 hearing on September 28. (Fillerup Decl., Ex. 1) Judge Breyer, like this Court, rejected Mr.
 14 Attridge's claim that he did not have actual notice of the September 28 hearing. Judge Breyer's
 15 ruling is res judicata and law of the case. Ms. Hewlett sought to obtain relief via a writ of
 16 mandamus, rather than a notice of appeal, and she is now bound by the order issued by Judge
 17 Breyer. Even if Ms. Hewlett had filed a timely notice of appeal, her argument that she did not
 18 have notice has been decided against her on the merits and she cannot relitigate that issue. *See,*
 19 *e.g., Kirshner v. Uniden*, 842 F.2d 1074, 1078 (9th Cir. 1988)(the prior denial of a petition for
 20 writ of mandamus can have res judicata effect if the denial is on the merits).

21 **3. Equitable Mootness Precludes Ms. Hewlett from Prevailing on Appeal**

22 An appeal from a Bankruptcy Court order will be dismissed based on the concept of
 23 equitable mootness when the appellant failed and neglected diligently to pursue her available
 24 remedies to obtain a stay of the contested order. *E.g., Trone v. Roberts Farms, Inc.*, 652 F.2d
 25 793 (9th Cir. 1981). In this case, the District Court will dismiss Ms. Hewlett's appeal based on
 26 the doctrine of equitable mootness because Ms. Hewlett failed to take steps to stay the September
 27 28 Order until after the sale to Mr. Batt had already closed.

28 In light of the likelihood that the District Court will dismiss Ms. Hewlett's appeal based on

1 equitable mootness, the motion to stay should be denied.

2 **4. Constitutional Mootness Precludes Ms. Hewlett from Prevailing on**
 3 **Appeal**

4 The doctrine of constitutional or real mootness applies when “an event occurs while a case
 5 is pending appeal that makes it impossible for the court to grant ‘any effectual relief.’” *National*
 6 *Mass Media v. Stanley*, 152 F.3d 1178, 1180 (9th Cir. 1998), citing and quoting *Church of*
 7 *Scientology v. United States*, 506 U.S. 9, 12 (1992). In this case, in spite of the fact that the order
 8 removing Ms. Hewlett from the property was entered seven weeks ago, Ms. Hewlett never took
 9 any action to stay the order until November 19, 2007. During that seven-week period, the Trustee
 10 relied on the September 28 Order in proceeding with the sale of the Clay Property to Mr. Batt and
 11 closing on the sale to Mr. Batt. The sale closed on November 16, 2007, the secured creditors
 12 were paid on November 16, back property taxes were paid on November 16, and the costs of the
 13 sale were paid on November 16. Mr. Batt has taken over possession of the property. Mr. Batt
 14 now owns the property. Based on the real mootness doctrine, the District Court will likely
 15 dismiss Ms. Hewlett’s appeal because it is impracticable, if not impossible, to undo the sale that
 16 has already taken place.

17 **5. There was Actual Notice of the September 28 Hearing**

18 In denying Ms. Hewlett’s petition for a writ of mandamus, Judge Breyer has already ruled
 19 that Ms. Hewlett had actual notice of the motion to remove her from the Clay Property and her
 20 counsel was present at the hearing. In addition, the record on appeal will show that Mr. Attridge
 21 had received notice at the hearings on September 14 and September 21 that the Trustee would be
 22 filing her motion to remove Ms. Hewlett from the property and that the motion had been filed on
 23 September 19, 2007. Ms. Hewlett’s “lack of notice” objection was based on her lawyer’s
 24 intentional avoidance of the motion, rather than a real case of lack of notice. This case is different
 25 from the cases cited by Ms. Hewlett in which there was a genuine lack of notice. Ms. Hewlett’s
 26 lawyer was in attendance at the hearing on September 28 because he had actual notice of the
 27 hearing and the motion. He simply chose not to review the Trustee’s motion in order to assert a
 28 technicality as an objection.

1 **6. Ms. Hewlett Lacks Standing to Appeal the November 2 Order**

2 On November 2, 2007, the Court entered an order removing Javier Rivera from the Clay
 3 Property. (Fillerup Decl., par. 11) This order cannot be the basis of a successful appeal by Ms.
 4 Hewlett for several reasons. First, the November 2 Order relates to Mr. Rivera only. It does not
 5 relate to Ms. Hewlett in any respect, and it does not alter the terms of the September 28 Order in
 6 any material way relating to Ms. Hewlett. As a result, the November 2 Order does not allow Ms.
 7 Hewlett to have another bite at an appeal of the September 28 order. *See, e.g., In re Lahtinen*,
 8 2004 U.S.Dist.Lexis 2604 (N.D. Ill. 2004); *In re Dow Corning*, 2002 U.S.Dist.Lexis 6484 (E.D.
 9 Mich. 2002). Second, Ms. Hewlett has no standing to appeal the November 2 order because she
 10 has no pecuniary interest in that order. *E.g., Fondiller v. Robertson*, 707 F.2d 441, 443 (9th Cir.
 11 1983); *Lynch v. California PUC*, 2004 U.S.Dist.Lexis 6022 (N.D. Cal. 2004). Third, neither Ms.
 12 Hewlett nor Mr. Rivera have standing to appeal the November 2 Order because they did not file a
 13 timely opposition to the Trustee's motion to remove Mr. Rivera and they did not appear at the
 14 November 2, 2007 hearing and oppose the Trustee's motion to remove Mr. Rivera from the Clay
 15 Property. (Fillerup Decl., par. 11) *E.g., Lynch v. California PUC*, 311 B.R. 798, 2004
 16 U.S.Dist.Lexis 13808 (N.D. Cal. 2004) ("Federal courts agree that, to have standing to bring a
 17 bankruptcy appeal, appellants must have attended the bankruptcy court proceedings and timely
 18 objected to the order.").

19 **C. A Stay Order Would Prejudice Creditors and the Estate**

20 Even if Ms. Hewlett could establish irreparable harm and a likelihood of success on the
 21 merits (which she has not done), then the motion to stay should be denied because a balancing of
 22 hardships does not favor granting the stay. In this case, the secured creditors have relied on the
 23 proposed sale of the Clay Property to Mr. Batt and they have relied on the fact that the Batt Sale
 24 would pay the debt secured by the Clay Property. The closing of the Batt Sale produced funds
 25 sufficient to pay secured creditors and it would be unfair to them now, after they have relied on
 26 the pendency of the sale, if Ms. Hewlett were permitted to unravel the sale. It would also be
 27 harmful to the estate to force the Trustee to go through the long and expensive process of re-
 28 selling the Clay Property, particularly in light of the increased costs and difficulty that Ms.

1 Hewlett has already caused the Trustee in concluding the Batt Sale.

2 **D. Unclean Hands Support Denial of Ms. Hewlett's Motion to Stay**

3 There are several other factors that the Court should take into account in denying Ms.
 4 Hewlett's motion to stay. First, Ms. Hewlett did not seek to address her claimed lack of notice in
 5 a timely manner. Second, Ms. Hewlett has failed to comply with the September 28 Order. She
 6 has repeatedly violated the order by entering the Clay Property after the order was issued. It
 7 appears from Ms. Hewlett's conduct in violating the September 28 Order with impunity that this
 8 motion and the effort at an untimely appeal of the September 28 Order is more of a protection
 9 against contempt proceedings than it is an effort to undo the order itself. Third, Ms. Hewlett has
 10 violated the automatic stay by filing a complaint with the San Francisco Rent Control Board after
 11 the September 28 Order issued. Fourth, Ms. Hewlett has violated the Court's accounting order
 12 by failing to provide a complete accounting of income and expenses relating to the Clay Property
 13 on or before November 7, 2007. Fifth, Ms. Hewlett violated the Court's September 28 and
 14 November 2 orders when she entered the Clay Property on November 7, 2007 to change the lock
 15 on unit #3. In light of the circumstances, Ms. Hewlett's claim for equitable relief in the form of
 16 a stay of the September 28 Order should be denied based on her own misconduct.

17 **III. CONCLUSION**

18 Based on the foregoing, Ms. Hewlett's motion for relief under Federal Rule of Civil
 19 Procedure 60(b)(3) should be denied, and her alternative motion for a stay under Bankruptcy
 20 Rule 8005 should be denied.

21 DATED: November 26, 2007 LUCE, FORWARD, HAMILTON & SCRIPPS LLP

22
 23 By: 

24 Jeffrey L. Filledup
 25 Attorneys for JANINA M. ELDER,
 26 Chapter 11 Trustee
 27
 28

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285

1 Michael A. Isaacs, State Bar No. 99782
Jeffrey L. Fillerup, State Bar No. 120543
2 Nhung Le, State Bar No. 209552
LUCE, FORWARD,
3 HAMILTON & SCRIPPS LLP
Rincon Center II, 121 Spear Street, Suite 200
4 San Francisco, California 94105-1582
Telephone No.: 415.356.4600
5 Fax No.: 415.356.3895
E-mail: misaacs@luce.com
6 jfillerup@luce.com
nle@luce.com
7

8 Attorneys for
JANINA M. ELDER, Chapter 11 Trustee
9

10 UNITED STATES BANKRUPTCY COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 In re

14 SOPHIE NG,

15 Debtor.

Case No. 06-30904 TEC

Chapter 11

Hon. Thomas E. Carlson

16 **DECLARATION OF JEFFREY L.**
17 **FILLERUP IN OPPOSITION TO MS.**
18 **HEWLETT'S MOTION FOR RELIEF**
19 **UNDER RULE 60(b)(3), OR MOTION TO**
20 **STAY PURSUANT TO RULE 8005**

21 Date: November 28, 2007

Time: 10:00 a.m.

Place: 235 Pine Street

Courtroom 23

San Francisco, CA

1 I, Jeffrey L. Fillerup, declare as follows:

2 1. I am a partner in the law firm of Luce, Forward, Hamilton & Scripps LLP. We are
3 counsel for Janina M. Elder, the duly appointed Chapter 11 Trustee (the "Trustee") in this case,
4 and I have personally been involved in the proceedings in this case regarding the proof of claim
5 filed by Patricia Hewlett, the Trustee's objection to the proof of claim, the Trustee's adversary
6 proceeding against Ms. Hewlett and Mr. Sierra, and Ms. Hewlett's objection to the sale of the
7 1385 Clay Property to A.J. Batt. This declaration is submitted in opposition to Patricia Hewlett's
8 motion for a stay, filed on November 19, 2007. I have personal knowledge of the facts in this
9 declaration, except where otherwise stated, and I could and would testify thereto if called upon to
10 do so.

11 2. On August 3, 2007, this Court heard the Trustee's motion, under Section 363(f),
12 for leave to sell an asset of the bankruptcy estate in this case, a 24-unit apartment building located
13 at 1385 Clay Street, San Francisco, California (the "Clay Property"). Patricia Hewlett had filed
14 an opposition to the Trustee's motion. The Court granted the Trustee's motion and authorized the
15 Trustee to sell the Clay Property free and clear of liens and interests, including Ms. Hewlett's
16 claim that she was entitled to specific performance of an alleged contract under which she had an
17 option to purchase the Clay Property. The Court entered an order granting the Trustee's motion
18 on August 20, 2007.

19 3. Thereafter, the Trustee entered into a contract to sell the Clay Property to A.J. Batt
20 for \$4.68 million, less a credit of \$80,000 relating to certain tenant issues. The contract required
21 as a condition to closing that the Trustee remove Patricia Hewlett from the Clay Property. At a
22 hearing on September 14, 2007, the Court authorized the sale of the Clay Property to Mr. Batt,
23 but allowed Ms. Hewlett an opportunity to present an overbid by Monday, September 17. Ms.
24 Hewlett's attorney, James Attridge, was present at the September 14 hearing. Ms. Hewlett
25 presented a bid to the Trustee on September 17, 2007, but the bid was not accepted by the Trustee.
26 During a follow-up hearing on September 21, 2007, Ms. Hewlett's attorney, James Attridge,
27 appeared and objected to the Trustee's proposed sale of the Clay Property to Mr. Batt. The Court
28 overruled Ms. Hewlett's objection to the sale of the property to Mr. Batt, and the Court issued an

1 order on October 1, 2007 overruling Ms. Hewlett's objection and allowing the sale to Mr. Batt to
2 proceed.

3 4. During the hearing on September 14, 2007, the Court set a date (September 19) for
4 the Trustee to file her motion to remove Ms. Hewlett from the Clay Property. Mr. Attridge was
5 present at this hearing. The Trustee's motion to remove Ms. Hewlett from the Clay Property was
6 filed on September 19, 2007, and the hearing was set for September 28, 2007. The Trustee's
7 motion to remove Ms. Hewlett from the Clay Property (filed on September 19) was also discussed
8 during the course of the September 21, 2007 hearing in this matter, which was attended by Mr.
9 Attridge. The Trustee's motion to remove Ms. Hewlett was set for hearing on September 28,
10 2007, which was the hearing date set by the Court during the hearing on September 14.

11 5. Mr. Attridge appeared at the hearing on September 28, 2007. At the hearing, the
12 Court granted the Trustee's motion to remove Ms. Hewlett from the Clay Property. The Court
13 issued an order that day, and I served the order on Mr. Attridge on September 28, 2007 (the
14 "September 28 Order").

15 6. Mr. Attridge has never asked me for a copy of the motion to remove Ms. Hewlett,
16 which I caused to be e-filed on September 19, 2007. Mr. Attridge never informed me that he did
17 not have a copy of the motion to remove Ms. Hewlett. If Mr. Attridge had called me or emailed
18 me that he did not have the motion to remove Ms. Hewlett, I would have immediately faxed or
19 emailed the motion to him. Because I never heard from Mr. Attridge, I did not have any reason to
20 believe that he did not have the motion to remove Ms. Hewlett. Mr. Attridge had told me in the
21 past that he was able to obtain pleadings that were e-filed from other lawyers. Even though
22 Mr. Attridge still claims to have never seen the motion, he has still never asked me for a copy of
23 the motion.

24 7. The time period for Ms. Hewlett to file a notice of appeal of the September 28
25 Order expired on October 9, 2007.

26 8. After Ms. Hewlett's counsel was served with the September 28 Order, Ms. Hewlett
27 did not file a notice of appeal within the 10-day period, and Ms. Hewlett did not seek
28 reconsideration of the September 28 Order. Also, Ms. Hewlett never sought to stay the

1 September 28 order until filing this motion to stay on November 19, 2007, seven weeks after
2 being served with the September 28 Order. Once the September 28 Order was issued, the
3 Trustee and her counsel undertook to close on the sale of the Clay Property to Mr. Batt as quickly
4 as possible. On November 16, the Trustee and the Trustee's broker advised me that the sale to
5 Mr. Batt closed on November 16, 2007 and the secured creditors were paid from the proceeds of
6 the sale, the costs of the sale were paid, and the remaining proceeds were paid to the Trustee.
7 Ms. Hewlett filed this motion to stay the September 28 Order after the sale of the Clay Property
8 to Mr. Batt had closed.

9 9. After the September 28 Order was issued and served, Ms. Hewlett did seek relief
10 from other tribunals after the September 28 Order was issued and served. Ms. Hewlett filed a
11 complaint against the Trustee with the San Francisco Rent Control Board, alleging that the Trustee
12 had improperly evicted Ms. Hewlett. That complaint was dismissed by the San Francisco Rent
13 Control Board based on its determination that it lacked jurisdiction because the Clay Property was
14 subject to the jurisdiction of the Bankruptcy Court. Ms. Hewlett also filed a petition for a writ of
15 mandamus in the United States District Court for the Northern District of California seeking a writ
16 setting aside the September 28 Order. Ms. Hewlett's petition was denied by Judge Breyer
17 pursuant to an order issued on October 31, 2007. Attached hereto as Exhibit 1 is Judge Breyer's
18 October 31, 2007 order denying Ms. Hewlett's petition for a writ of mandamus.

19 10. Ms. Hewlett's claim that I have committed fraud in connection with the Trustee's
20 motion to remove Ms. Hewlett from the Clay Property is false. I was present in Court and Mr.
21 Attridge was present in Court on September 14, 2007 and September 21, 2007, when the Trustee's
22 motion to remove Ms. Hewlett from the Clay Property was discussed and the hearing date for that
23 motion was set for September 28, 2007. Mr. Attridge appeared in court on September 28, 2007
24 and claimed at that time that he had not received the motion. Mr. Attridge never advised me
25 before September 28 that he had not received the motion. If he had, I would have faxed the
26 motion to him immediately. It appears from the circumstances that while Mr. Attridge had actual
27 notice of the Trustee's motion and the September 28, he failed to request the motion in order to
28 create a technical objection to the Trustee's motion. Mr. Attridge's conduct is supported by the

1 fact that Mr. Attridge did obtain the proof of service of the Trustee's motion in order to support
 2 his attack on the September 28 Order, but he did not obtain the motion itself so that he could
 3 "claim" that he has never seen the Trustee's motion.

4 11. On October 26, 2007, the Trustee e-filed a motion to remove Javier Rivera
 5 (Patricia Hewlett's brother) from the Clay Property, and set the hearing of the motion for
 6 November 2, 2007. The Court had granted the Trustee's application for an order shortening time
 7 to allow this motion to be heard on shortened time because the removal of Mr. Rivera was
 8 necessary in order to close on the sale of the Clay Property to Mr. Batt. The Trustee's motion
 9 was also served on Ms. Hewlett's counsel (James Attridge) and Mr. Rivera by fax and U.S. Mail
 10 on October 26, 2007. I appeared at the hearing of the motion to remove Mr. Rivera from the Clay
 11 Property on November 2, 2007. Neither Mr. Rivera nor Mr. Attridge appeared at the hearing to
 12 oppose the motion. The Court granted the motion to remove Mr. Rivera from the Clay Property
 13 on November 2, 2007 and the Court entered an order removing Mr. Rivera from the Clay Property
 14 that same day. I served Mr. Attridge and Mr. Rivera with the November 2, 2007 order that same
 15 day.

16 I declare under penalty of perjury under the laws of the United States that the above
 17 statements are true and that if called as a witness I could and would testify to their truthfulness.
 18 This declaration was executed on the 26th day of November, 2007 in San Francisco, California.

19 
 20 Jeffrey L. Fillerup
 21
 22
 23
 24
 25
 26
 27
 28

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EXHIBIT 1

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PATRICIA HEWLETT,

No. C 07-05532 CRB

Plaintiff,

**ORDER DENYING PETITION FOR
WRIT OF MANDAMUS**

v.

UNITED STATES BANKRUPTCY
COURT,

Defendant.

Patricia Hewlett petitions this Court for a writ of mandamus vacating the Bankruptcy Court's order mandating that Hewlett vacate the premises at 1385 Clay Street, Apartment 3 in San Francisco, California. The petition is DENIED.

"The remedy of mandamus is a drastic one, to be involved only in extraordinary situations." Kerr v. United States District Court, 426 U.S. 394, 402 (1976). "[O]nly exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." Will v. United States, 389 U.S. 90, 95 (1967). Put simply, this case does not present the kind of "exceptional" or "extraordinary" situation that warrants mandamus relief.

For a mandamus petition to be granted, the plaintiff must demonstrate that the lower court clearly erred as a matter of law. See Douglas v. United States District Court, 495 F.3d 1062, 1066 (9th Cir. 2007). In this case, mandamus is inappropriate because it is not at all

1 clear that the Bankruptcy Court erred when it ordered that Hewlett vacate the 1385 Clay
2 Street premises.

3 As at least one circuit court has concluded, § 363(f) of the Bankruptcy Code
4 authorizes bankruptcy courts to allow the sale of a debtor's property unencumbered by a
5 lessee's possessory interests, despite the terms of another section of the code, § 365(h),
6 which generally protects a lessee's rights upon rejection of a lease. See Precision Indus., Inc.
7 v. Qualitech Steel SBQ, LLC, 327 F.3d 537 (7th Cir. 2003). While the issue remains
8 unsettled in this circuit, the bankruptcy court's conclusion that it had authority to sell the
9 1385 Clay Street property free and clear of Hewlett's possessory interest cannot be deemed
10 "clearly erroneous."

11 Hewlett argues that the bankruptcy court clearly erred because she did not have proper
12 notice of the trustee's motion to remove her from the property. As an initial matter, it is
13 unclear to this Court how Hewlett's attorney attended the hearing if he had not received
14 notice. Regardless, local bankruptcy court rules provide that electronic notice, which was
15 indisputably sent to Hewlett's counsel, constitutes effective service of all notices governed
16 by Federal Rules of Bankruptcy Procedure 7005 and 9022. See N. Dist. of Cal. Bankr. Ct.
17 L.R. 9013-3(c). Perhaps Hewlett believes that Local Rule 9013-3(c) contravenes the federal
18 due process clause, but that is far from clear to this Court.

19 Hewlett also argues that the bankruptcy court's order was clearly erroneous because it
20 conflicts with local landlord/tenant law. It is a well-established principle that pursuant to the
21 Supremacy Clause, federal law trumps state and municipal laws that "interfere with, or are
22 contrary to" it. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824). The notion that a
23 bankruptcy judge cannot act under a provision of the bankruptcy code because it would
24 conflict with San Francisco's Tenant's Rights Ordinance is a non-starter.

25 ///

1 Because Hewlett has not established that the bankruptcy court clearly erred as a matter
2 of law, the mandamus petition is DENIED.

3 **IT IS SO ORDERED.**

4
5
6 Dated: October 31, 2007



CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California

297

Entered on Docket

December 13, 2007

GLORIA L. FRANKLIN, CLERK

U.S. BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA



Signed and Filed: December 13, 2007

A handwritten signature in black ink, appearing to read "T. E. Carlson", is written over a horizontal line.

THOMAS E. CARLSON
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re	)	Case No. 06-30904 TC
)	
SOPHIE H. NG,	)	Chapter 11
aka SOPHIE HA NG,)	
aka SOO HA NG,)	
aka SOPHIE HA NG LUM,)	
)	
)	
Debtor.)	

ORDER DENYING MOTION FOR STAY PENDING APPEAL

The court held a hearing on November 29, 2007 on the motion of Patricia Hewlett for a stay pending appeal of this court's September 28, 2007 order requiring her to turn over possession of the real property known as 1385 Clay Street, San Francisco, California (the Property). Jeffrey L. Fillerup appeared for the chapter 11 trustee, Janina M. Elder (Trustee). James Attridge appeared for Ms. Hewlett.

Upon due consideration, and for the reasons stated on the record and in the accompanying memorandum, the court hereby orders that the motion is denied.

****END OF ORDER****

Court Service List

Jeffrey Fillerup, Esq.
Luce, Forward, Hamilton and Scripps
121 Spear Street, Suite 200
San Francisco, CA 94105

James Attridge, Esq.
Scopelitis, Garvin, Light and Hanson
1390 Market Street, Suite 1204
San Francisco, CA 94102-5306

11-29-07 Hearing Transcript

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE THOMAS E. CARLSON, JUDGE

In Re:	)	Case No. 06-30904-TEC
	)	Chapter 11
SOPHIE H. NG,)	
	)	<u>MOTION for STAY</u>
Debtor.	)	<u>PENDING APPEAL</u>
<hr/>		
JANINA M. ELDER, Chapter 11	)	Adv. 07-03071
Trustee,)	
	)	<u>MOTION to COMPEL PRODUCTION</u>
Plaintiff,	)	<u>of DOCUMENTS and INITIAL</u>
	)	<u>DISCLOSURE INFORMATION</u>
v.)	
)	
PATRICIA ISABELLE HEWLETT,)	
REGULO CUBILLOS SIERRA,)	
)	
Defendants.	)	Thursday, November 29, 2007
<hr/>		San Francisco, California

Appearances:

For Janina M. Elder, Chapter 11 Trustee:	Jeffrey L. Fillerup, Esq. Luce, Forward, Hamilton & Scripps LLP 121 Spear Street, Suite 200 San Francisco, California 94105 (415) 356-4600
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For Patricia Hewlett:	James Attridge, Esq. 1390 Market Street, Suite 1204 San Francisco, California 94102-5306 (415) 552-3088
-----------------------	--

Digital Court Recorder:	United States Bankruptcy Court Clerk of the Court Jane L. Galvani 235 Pine Street, 23rd Floor (94104) Post Office Box 7341 San Francisco, California 94120-7341 (415) 268-2366
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Certified Electronic Transcriber:	Palmer Reporting Services 1948 Diamond Oak Way Manteca, California 95336-9124
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Proceedings recorded by digital recording;
transcript produced by federally-approved transcription service.

Motion for Stay Pending Appeal

2

1 Thursday, November 29, 2007 10:21 o'clock a.m.

2 P R O C E E D I N G S

3 THE COURT: Good morning. Have a seat.

4 MR. FILLERUP: Jeffrey Fillerup for the Chapter 11
5 Trustee Janina Elder.

6 MR. ATTRIDGE: James Attridge for Patricia Hewlett.

7 THE COURT: Okay. Let's talk about the discovery
8 first. You were to go over to the unit, take everything out.
9 Did that were out?

10 MR. ATTRIDGE: I went over there for two hours, the
11 Tuesday before Thanksgiving. Was told by Mr. Batt I had to
12 leave at 5:15 because he had a previous appointment. I was
13 under the impression that he was under the impression that I was
14 a overdressed moving man, that I was just going to box
15 everything up and get out of there.

16 What I was there to do was to go through the documents
17 to determine what was to be produced and what we needed for the
18 accounting. Quite frankly, it's about, I would have to estimate
19 about a five-hour job, and I was given two hours. And it was
20 never rescheduled. And apparently - I got a letter yesterday
21 saying that Mr. Batt intends to box everything up and store it
22 someplace, which of course frustrates my ability to do what you
23 had ordered. So that's where we stand on the discovery.

24 MR. FILLERUP: Well, -

25 THE COURT: How much is there? Did you go along?

Motion for Stay Pending Appeal

3

1 MR. FILLERUP: Well, that's not really accurate. What
2 happened was at the last hearing on November 16, I indicated
3 that the Trustee would make an effort to arrange with Mr. Batt
4 so that Mr. Attridge would have access to Unit Number 3 at the
5 property.

6 We obtained access for Mr. Attridge on November 20 at
7 three o'clock. And Mr. Attridge -

8 THE COURT: That was Tuesday, yeah.

9 MR. FILLERUP: That was Tuesday. And Mr. Attridge had
10 a two-block - two-hour block of time. He ended up removing some
11 of the documents, but there were still about ten - ten boxes of
12 documents left. And Mr. Attridge did not want to allow any
13 further access back to Unit Number 3 by Mr. Attridge or by the
14 Trustee -

15 THE COURT: You mean Mr. Batt.

16 MR. FILLERUP: Mr. Batt, right, did not want to allow
17 any further access. Mr. Batt felt like he had given access and
18 Mr. Attridge hadn't removed the documents.

19 So I was able to negotiate earlier this week with Mr.
20 Batt for my office to go into that unit, box up all of the
21 documents. And I have all of the documents from that unit,
22 about ten boxes, at my doc- - at my office that are sealed. So
23 we - in about a half an hour someone from my office boxed up all
24 the documents in there and was out. So all the documents are
25 out of Unit Number 3 now.

Motion for Stay Pending Appeal

4

1 THE COURT: Is there anything else left In Unit Number
2 3?

3 MR. FILLERUP: There - there is furniture and
4 clothing. And we've asked Mr. Attridge if that belongs to Ms.
5 Hewlett and he hasn't responded. We don't know who it belongs
6 to. So the Trustee is just going to move - move that property
7 out and store it.

8 MR. ATTRIDGE: So, in other words, what they did is in
9 violation of your order. I was supposed to go over there, go
10 through the documents. You have to remember that there are all
11 kinds of documents in that apartment that have nothing to do
12 with this case, that are not in the least bit responsive. Some
13 of them, quite frankly, are none of my business.

14 One of the things we were in search of were receipts,
15 cash receipts so we can do the accounting. It takes a long time
16 to determine whether or not something - some things look like
17 receipts but aren't. But what we agreed to do on the 16th, I
18 was not given the time or the effort to. And Mr. Batt
19 apparently has now appointed himself judge in the case.

20 THE COURT: Are you ready to turn these over?

21 MR. FILLERUP: I - as soon as my office obtained those
22 documents, I wrote Mr. Attridge a letter telling him I had the
23 documents and he should have them picked up from my office. So
24 they've been available to Mr. Attridge for the last two days.
25 And I want him to pick them up because I don't want them.

Motion for Stay Pending Appeal

5

1 They're -

2 THE COURT: The Trustee has only - the only interest
3 the Trustee is asserting is one of being able to see some of
4 these as appropriately-discoverable evidence?

5 MR. FILLERUP: Well, it is also - in addition to that
6 it's a part of the sale where the Trustee had agreed to vacate
7 Unit Number 3 -

8 THE COURT: Yeah, the Trus- - the debtor is not - the
9 Trustee is not asserting any proprietary interest in those
10 documents.

11 MR. FILLERUP: Oh, no. And -

12 THE COURT: So just turn them over to - to Mr.
13 Attridge.

14 MR. FILLERUP: It may be that we are entitled to have
15 those produced, but I don't know what's in them.

16 THE COURT: But as evidence?

17 MR. FILLERUP: Correct. I don't -

18 THE COURT: Your only interest is - it's the same as
19 if it was owned by General Motors. They might be evidence.

20 MR. FILLERUP: It may be evidence. I assume there's
21 some documents that should be produced in the adversary
22 proceeding, but I haven't looked at the documents so I don't
23 know.

24 THE COURT: And you're not seeking to copy them at
25 this point, you're just going to -

Motion for Stay Pending Appeal

6

1 MR. FILLERUP: No.

2 THE COURT: - let him produce?

3 MR. FILLERUP: No one in my office has looked at them
4 and I haven't looked at them.

5 MR. ATTRIDGE: It's still her property and a lot of
6 this is stuff - ongoing sales she's involved in.

7 THE COURT: Well, why don't you just pick up the
8 boxes?

9 MS. HEWLETT: (Indecipherable.)

10 MR. ATTRIDGE: Because I didn't know about this
11 until -

12 MS. HEWLETT: (Indecipherable.)

13 MR. ATTRIDGE: - about a day and a half ago.

14 And it's - the other thing is the representation -
15 first of all, on the 16th you brought up the subject of - or Mr.
16 Fillerup brought up the subject of getting Mrs. Hewlett out.
17 And what you said at that time was: Well, we'll cross that
18 bridge when we come to it, or: We'll deal with it later; all
19 we're going to deal with now is the documents. And you came up
20 with the - your solution, which I followed and they didn't.

21 In the interim or on the 16th the representation was
22 made that the building had been sold, that it had been conveyed.
23 And Mr. Fillerup has informed me today that they have collected
24 money, they've paid money. So as of right now we have -

25 THE COURT: Has it closed, has title transferred?

Motion for Stay Pending Appeal

7

1 MR. FILLERUP: Yes. Yeah, and when we were here on
2 November 16 I had indicated that the closing process had started
3 the day before and - and that morning, the morning of the 16 -
4 16th, the -

5 THE COURT: Okay.

6 MR. FILLERUP: - the documents were recorded and it
7 closed that morning.

8 MR. ATTRIDGE: So -

9 THE COURT: So you want - does she want her furniture?

10 MR. ATTRIDGE: She wants the unit.

11 MS. HEWLETT: I want (indecipherable).

12 MR. ATTRIDGE: She has -

13 THE COURT: We've already dealt with that. Do you
14 want your furniture?

15 MR. ATTRIDGE: Yes, she wants the furniture. She also
16 wants the unit back, which is the basis of the request for stay
17 which is what is scheduled for today.

18 MR. FILLERUP: And so that's what this is all about.
19 Mr. Attridge didn't remove the documents. Ms. Hewlett won't
20 remove the furniture because she wants to continue to assert the
21 right to possession of the unit.

22 THE COURT: Okay.

23 MS. HEWLETT: (Indecipherable.)

24 THE COURT: Now let - will you quit muttering back
25 there, please? You have counsel. Let your counsel speak.

Motion for Stay Pending Appeal

8

1 You're out of order.

2 I looked at your motion, read your motion for stay.
3 What — what doesn't — what isn't set forth in your motion that I
4 can see is, you know, even assuming that your — you didn't have
5 the ability to argue at that hearing on the turnover, that you
6 should have had, you didn't get the kind of notice that you
7 should have had, clearly you had some notice, you didn't say how
8 it all would have been different.

9 MR. ATTRIDGE: Actually —

10 THE COURT: In other words, what is the — you know,
11 Judge Breyer addressed the merits of it, basically saying, you
12 know, it really turns on whether 365(h) applies. Is there
13 something more than 365(h) or your idea that — that somehow the
14 Bankruptcy Court is limited by rent control ordinances in San
15 Francisco.

16 Now let me say one more thing. Mr. Fillerup, this is
17 not law of the case. Judge Breyer's decision is not law of the
18 case because the question here is a stay pending appeal, which
19 is a discretionary equitable remedy and the matter Judge Breyer
20 decided was a question of mandamus, which is a much, much higher
21 threshold. So that — it's law of the case of mandamus, I guess,
22 at the District Court level, but this is a different question.
23 It's like a question of collateral estoppel, the issue is not
24 the same.

25 I mean all the — all the findings of — conclusions of

Motion for Stay Pending Appeal

9

1 law he made would have equal force, but the finding itself that
2 no relief should be granted on mandamus does not decide the
3 question of whether a stay pending appeal should be granted.

4 MR. ATTRIDGE: Right. And what he ruled was that he
5 noted that there was - well, that the - at one point he said,
6 well, the local efiling rule might violate due process, but that
7 doesn't mean that it rises to the level of an abuse of
8 discretion by the Bankruptcy Court. And also that -

9 THE COURT: Well, I think he said it didn't violate
10 due process.

11 MR. ATTRIDGE: He left it - he worded is this not a
12 very curious way, as is his want.

13 THE COURT: It was - it was a very funny decision, as
14 Judge Breyer often is.

15 MR. ATTRIDGE: He's a funny a fellow, yeah.

16 THE COURT: Funny in the sense of being very witty.

17 MR. ATTRIDGE: Yes. But the other thing he pointed
18 out was, and this is - this is important, this answers your
19 question that you posed. It would have been different because
20 the weight of authority says that a leasehold is not
21 extinguished by a turnover order. But that this Court did not
22 abuse its discretion, because there's a Seventh Circuit case
23 which goes the other way applying Indiana law. 'So there's a
24 colorable argument there, therefore I can't grant extraordinary
25 relief.'

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1 If this were to go up de novo review, I believe that
2 the weight of authority would compel the District Court to
3 follow the District Court decision in Alaska and also the
4 *Millennium Bank* case in which a California court of appeals
5 applied California law, which does apply here. And I actually
6 rather strongly disagree with what Judge Breyer concluded here,
7 which I thought was actually a throw-away argument, just for the
8 sake of saying something else witty, but that in *Butner versus*
9 *United States*, a unanimous decision of the U.S. Supreme Court,
10 says very clearly that these issues have got to be analyzed by
11 applying state law. And, you know, *Gibbons versus Ogden*
12 notwithstanding, which was not a supremacy-clause cause, anyway.
13 I don't know why he relied on it. That's an interstate-clause
14 cause.

15 So it would have been different and the reason why it
16 would have been different is the argument is spelled out in the
17 writ itself, which I incorporated by reference.

18 And the weight of authority just says a turnover order
19 and the sale does not extinguish a person's right to the
20 leasehold. Right on the nose.

21 THE COURT: Well, a sale, the turnover order was - a
22 sale of a piece of real property, -

23 MR. ATTRIDGE: Right.

24 THE COURT: - doesn't not distinguish - does not
25 extinguish a lease on the property.

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1 MR. ATTRIDGE: Right. And that's - that's all we're
2 talking about here -

3 THE COURT: Of which - of which the - of which the
4 purchaser has notice at least, constructive or actual notice.

5 MR. ATTRIDGE: Oh, certainly.

6 THE COURT: I mean you could have a BFP, I suppose,
7 but this isn't a BFP situation.

8 MR. ATTRIDGE: Yeah. He certainly had notice of it
9 because he's the one who made it a contingency of the sale, -

10 THE COURT: Yeah.

11 MR. ATTRIDGE: - which, by the way, was also a
12 violation of your order -

13 THE COURT: But the holds - it's all very different
14 under 363(f). And what 363(f) does, it says if an interest, and
15 a lease is an interest in land, is in dispute, it's in bona fide
16 dispute, the trustee can sell as if that interest can sell free
17 of that interest. That interest doesn't exist. It's something
18 that's totally irrelevant to state law. State law does not have
19 such a similar procedure.

20 And 365(h) deals only with a situation, to the extent
21 you're relying on that, where the debtor simply rejects the
22 lease, where the lease would otherwise be valid but for the
23 rejection, and the rejection is just simply - it's a breach by
24 the debtor which cannot be enforced by specific performance, in
25 which the breach is turned into a claim for monetary damages but

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1 there is a breach. And that lease would otherwise - I'm sorry.
2 (Coughing.) There's nothing that makes the lease unenforceable
3 or invalid. 363(f) is something entirely different.

4 MR. ATTRIDGE: The - the authorities make the point
5 that these are actually - these two provisions are in conflict
6 and that one has to trump the other ultimately.

7 THE COURT: They aren't in conflict because they
8 address different situations.

9 MR. ATTRIDGE: Well, -

10 THE COURT: 363 - if a property is just sold under
11 363(b), the purchaser takes it *cum onere*, with all the baggage
12 and garbage attached to it, -

13 MR. ATTRIDGE: Right.

14 THE COURT: - okay?

15 MR. ATTRIDGE: Including this case -

16 THE COURT: That's why - for instance, the
17 prototypical situation for a sale of property free and clear is
18 where there is a lien on the property that's in dispute. Let's
19 say the property is sold for \$500,000, there's a \$300,000 lien
20 that's in dispute, -

21 MR. ATTRIDGE: Right.

22 THE COURT: - genuine dispute. The trustee can convey
23 the property. The lien attaches to the proceeds. And the
24 purchaser gets clear title, even though the lien has not been
25 paid. Basically it transfers the claim from the property itself

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1 to the proceeds and that's what happened here.

2 The claim in this - even though it's a claim in real
3 property that would otherwise be unique and enforceable by
4 specific performance, the bankruptcy law allows that to be
5 transferred to the proceeds and converted into a monetary claim.
6 And that's what was done here.

7 MR. ATTRIDGE: As -

8 THE COURT: The turnover was simply ancillary to the
9 fact that for - for purposes of transferring this property the
10 property was being transferred without that lease. That lease
11 no longer was an encumbrance on the property. It was an
12 encumbrance on the proceeds of sale. And that's what makes it
13 so very different from nonbankruptcy law and it's what makes it
14 very different from 365(h).

15 MR. ATTRIDGE: The problem with that is, I understand
16 the point you're making insofar as it applies to the sale of the
17 building, okay. But our point is that we're only arguing here
18 about her right to that leasehold, not the big leasehold, the
19 little leasehold, the Unit 3 leasehold.

20 THE COURT: Yeah.

21 MR. ATTRIDGE: Okay. And -

22 THE COURT: Which was all part of the transfer -

23 MR. ATTRIDGE: Okay. What I don't understand -

24 THE COURT: - to - to -

25 MR. ATTRIDGE: - about that analysis -

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1 THE COURT: - from the debtor to the - to Ms. Hewlett
2 that was subject to the - the claim of abuse.

3 MR. ATTRIDGE: What I don't understand -

4 MS. HEWLETT: (Indecipherable.)

5 MR. ATTRIDGE: - about that, though, that argument is
6 how do you conclude that extinguishing this five-year leasehold
7 is somehow monetarily compensable?

8 THE COURT: Because under the Bankruptcy Code things
9 which are - would otherwise give right to an equitable remedy
10 are, in the definition of a claim, turned into monetary claims.

11 MR. ATTRIDGE: I don't see how one could fix a
12 monetary amount on it as a remedy. It just doesn't...

13 THE COURT: Well, that may be a problem you have in
14 proving the claim.

15 MR. ATTRIDGE: Right.

16 THE COURT: But the point is that the trustee under
17 363(f) is given this power, which is really extraordinary, it
18 doesn't exist that I know of in state law or elsewhere in
19 federal law, to basically say there is a dispute here, the
20 trustee needs to liquidate property that's subject to the
21 dispute. The trustee may sell the property and transfer the
22 claims to the proceeds. 'We'll figure out the dispute later.
23 We're selling it first.'

24 MR. ATTRIDGE: I understand that. I still don't
25 understand how you tie the lease into it. But I mean it's - you

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1 know, -

2 THE COURT: Because the motion to sell free and clear
3 included all her interests in the -

4 MR. ATTRIDGE: Okay.

5 THE COURT: - in that property, not just the lease
6 option but the lease.

7 MR. ATTRIDGE: Well, I take it then -

8 THE COURT: Well, -

9 MR. ATTRIDGE: - I'd have to take my shot elsewhere.
10 Now there's another issue here -

11 THE COURT: But just to round this out, by the way.
12 The - so the property when the sale closed, pursuant to the
13 363(f) sale order, - has that been appealed, by the way?

14 MR. ATTRIDGE: The sale order?

15 THE COURT: Yeah.

16 MR. FILLERUP: No, the sale order was not appealed.

17 THE COURT: Okay. So that property would have been
18 conveyed - is it Mr. Batt, is that the purchaser?

19 MR. FILLERUP: Yes.

20 MR. ATTRIDGE: Yes.

21 THE COURT: It would have been conveyed when the sale
22 closed free and clear of all interests of hers, leasehold,
23 option to purchase, everything else.

24 The - the turnover, getting her out of the property
25 before the closing, was basically an order issued under 105, the

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1 All Writs Statute, simply to facilitate that sale, to anticipate
2 the final, the result that would have happened because it
3 appeared to be an impediment to the actual closing of a sale
4 that was authorized under 363(f) and 363(b).

5 MR. FILLERUP: And that's correct, because Mr. Batt
6 absolutely refused -

7 THE COURT: Yeah.

8 MR. FILLERUP: - to close -

9 THE COURT: Right.

10 MR. FILLERUP: - with - without Ms. Hewlett being
11 removed from the property.

12 THE COURT: So, anyway, -

13 MS. HEWLETT: (Indecipherable.)

14 THE COURT: Okay. So, you know, I - I'm - I'm much
15 more sensitive than you think to the question of making sure you
16 have an adequate time to make an argument. That's why I'm
17 asking you today what the argument is, but I don't think the
18 argument works because of this extraordinary power of the
19 trustee under 363(f). And the - given that that order is final
20 and that order would have upon closing given Mr. Batt title free
21 and clear of all interests, leasehold and otherwise of Ms.
22 Hewlett, this - the turnover was simply an interim remedy
23 pursuant to an order which had already been issued regarding the
24 sale.

25 MR. ATTRIDGE: Well, to get back to the original

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1 question -

2 THE COURT: Yeah.

3 MR. ATTRIDGE: - actually, it's an extremely difficult
4 question to answer as to how things would have been different,
5 because I don't know what argument I would have made because I
6 have never seen the motion that I would have been arguing
7 against.

8 THE COURT: Well, you know, -

9 MR. ATTRIDGE: So I at least should be given the shot.
10 I mean I can understand you saying, well, you know, like it's an
11 offer of proof kind of an idea. It's like, well, what would -
12 what would you come up with, but I really can't give you an
13 answer to that.

14 THE COURT: Did you look in the file?

15 MR. ATTRIDGE: What?

16 THE COURT: I mean you obviously showed up at the
17 hearing.

18 MR. ATTRIDGE: Again, I want to get to that.

19 THE COURT: You obviously had actual knowledge of it,
20 if not formal notice.

21 MR. ATTRIDGE: No, not - I disagree with that. I have
22 - and I want to go into that.

23 THE COURT: Okay. But the point is that had you had
24 no notice of this and you would come back here and say you
25 should vacate your order, you should - under Rule 60(b) you

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1 should tell me why that order is wrong. And I think it's
2 incumbent upon you in this situation to -- to show that it was
3 wrong. And the motion for sale free and clear and the motion
4 for turnover are all in the file.

5 When you made this motion, you know, to -- the current
6 motion, for instance, you could tell me why it's wrong. And
7 you're not -- it's not hidden from you the basis under which this
8 was made.

9 MR. ATTRIDGE: Well, I have never seen it to this very
10 day.

11 THE COURT: Well, that doesn't mean you couldn't have
12 seen it --

13 MR. ATTRIDGE: And I want to get back to this -- I want
14 to get back to this notice issue, because I think it's extremely
15 unfair in some of the assumptions that are being made about me
16 personally.

17 And that is that on November 16th we had scheduled a
18 hearing on a motion to compel as well as a promised motion for
19 partial summary judgment, which Mr. Fillerup did not file. On
20 previous occasions --

21 THE COURT: November 16th. I mean this year -- this
22 month.

23 MR. ATTRIDGE: Right. On previous occasions I had
24 received letters saying, you know, your client's in default and
25 if you don't do such-and-such we're going to file so-and-so.

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1 Sometimes he did, sometimes he didn't. And over the course of
2 the last 20 years, many attorneys on the other side have told me
3 they were going to file motions, and they didn't.

4 My assumption was he did the same thing I did, which
5 was go to the library, look up the law and figure out that he
6 was wrong, and he didn't file it.

7 The only reason I showed up on the 28th is because I
8 double-checked the calendar to see if it was still on calendar -

9 THE COURT: Which date are we talking about now?

10 MR. ATTRIDGE: The 28th.

11 THE COURT: Of what?

12 MR. ATTRIDGE: September.

13 THE COURT: Okay. But you were talking about November
14 16th a minute ago -

15 MR. ATTRIDGE: Yeah, but that was just as an example
16 of a fact that people say they're going to file motions and then
17 don't do it, which is what I assumed happened on the 28th.

18 And the only reason I showed up on the 28th is because
19 it was still on the calendar and I know that just from your
20 style, from having been here before, you kind of like to turn
21 everything into a little bit of status conference and see, you
22 know, how we're going to proceed. And at that point in time we
23 were still in flux about what the schedule on the calendar was
24 going to be like. I assumed it was just going to be a mini case
25 management conference. And instead I got sandbagged.

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1 And I really don't think in that circumstance that -
2 THE COURT: Was that the date of the turnover or the
3 sale?

4 MR. ATTRIDGE: That was a turnover order.

5 THE COURT: Yeah.

6 MR. ATTRIDGE: Yeah. No, I - I have no argument to
7 make about the sale, -

8 THE COURT: Okay.

9 MR. ATTRIDGE: - about the - the earlier order
10 approving sale -

11 THE COURT: Let me - let me go back to one thing.
12 Whatever happened in the past that sale, once it closed,
13 extinguished all interest of hers in the property.

14 MR. ATTRIDGE: Well, I think as a matter of law it
15 didn't, so.

16 THE COURT: Well, but that's only under your argument
17 under 363 -

18 MR. ATTRIDGE: Right.

19 THE COURT: - 365(h)?

20 MR. ATTRIDGE: Yes.

21 THE COURT: Okay.

22 MR. ATTRIDGE: And that's -

23 THE COURT: But the - I think 365(h) applies only if
24 there is a valid lease. The court in that order, which has not
25 been appealed, stripped that off the property. I think as a

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1 practical matter the turnover is moot because the debtor doesn't
2 have any interest in that property to which he can be restored
3 at this point.

4 MR. FILLERUP: We never made a motion under 365
5 either. We never requested a rejection of the lease and there
6 was never an order -

7 THE COURT: Well, but the order says it's 363(f).

8 MR. FILLERUP: That's right. We -

9 THE COURT: And that order has not been appealed from.

10 My point is I think this is moot because the - once
11 the sale - this was an interim remedy only. And once the sale
12 closed, her leasehold was - was gone.

13 MR. ATTRIDGE: You know, actually I disagree with
14 that. I think that the -

15 THE COURT: Well, -

16 MR. ATTRIDGE: - the leasehold remains in effect and
17 that we now have a jurisdictional problem in the sense that that
18 building is no longer an asset of the bankruptcy estate, only
19 the proceeds are. And I don't know - and, frankly, I don't know
20 my core or noncore law very well, so I would have to go running
21 to the library. But it seems at this point in time the issue of
22 whether or not her stuff can be removed is something that's
23 going to have to be determined in a different forum, because I
24 don't think now that the building is no longer an asset of the
25 estate, that the question of evicting her or the question of

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1 whether or not they have converted her possession inside the
2 unit --

3 THE COURT: She doesn't have an interest in --

4 MR. ATTRIDGE: -- is core to this proceeding.

5 THE COURT: I think the question of jurisdiction is a
6 little different than you think.

7 MR. ATTRIDGE: Okay.

8 THE COURT: Her interest in the unit has been
9 terminated by the 363(f) order. She has abandoned property in
10 that unit. She left it there and she no longer has an interest
11 in the unit. You need to get relief to get it out of there. I
12 do think I have ample grounds for jurisdiction of giving you the
13 right to get the property out of there because Mr. Batt
14 basically requested this relief.

15 And I think it's -- it's implicit in the order at his
16 request that she being removed from the premises upon the
17 approval of the sale free and clear, she being removed to avoid
18 from interfering with the sale, she has to be given the right to
19 get her property out. And I will -- I will make sure that that
20 right, if it's exercised reasonably and fairly, in other words,
21 if you do it the right way and don't just try to muck up the
22 process here, she'll get her furniture back. I'm not going to
23 allow any gameplaying, though. There's been so much gameplaying
24 going on.

25 Okay. Let me -- let me just say this. I'm going to --

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1 I'm going to issue a written order that will explain this a
2 little more - explain this in writing as well as what I've said
3 here, denying the request for stay.

4 I want to let you know that in addition to basically
5 finding that the matter is functionally moot, that they - no
6 real argument of any persuasion has been made that the - you
7 know, that that relief couldn't have been granted, that I
8 wouldn't grant a stay pending appeal in any event because I
9 don't think this party has done equity. And I mean she has
10 interfered with the bankruptcy process left and right, and I
11 don't think a stay pending appeal of this would be appropriate
12 just on grounds of - I wouldn't grant equitable relief of that
13 sort to a person who's acted that way.

14 MR. ATTRIDGE: Well, I -

15 THE COURT: And it will be detailed in the order.

16 Now with respect to the motion to compel -

17 MR. FILLERUP: May I - may I make one comment about
18 that? And it relates to law of the case, and I just - you have
19 indicated your view on that argument. And I think eventually,
20 because there are these appeals pending and these appeals will
21 eventually end up with Judge Breyer, he will end up making that
22 call, -

23 THE COURT: Yeah.

24 MR. FILLERUP: - but my argument is that even on just
25 a normal appeal, this Court's factual findings are subject to a

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1 clear abuse standard. And that clear abuse or clear air
2 standard is the same standard in connection with a petition for
3 writ of mandamus. And so that's why I was making the argument
4 that it's law of the case. And that's the argument I'll make to
5 Judge Breyer when he eventually gets all of this.

6 THE COURT: But what I'm getting at is a stay pending
7 appeal can be granted without a clear showing of, you know, that
8 you're definitely entitled to prevail in law on the merits. You
9 can do it as a matter of preserving the status quo during the
10 appeal as a matter of equity.

11 Whereas mandamus requires that there be, you know,
12 quite clear legal error in what has been done. I think it's a
13 higher threshold with respect to whether the resulting situation
14 is legally erroneous. In other words, ambiguous situations can
15 give rise to a stay pending appeal. Ambiguous situations do not
16 give rise to mandamus.

17 And I don't - I'm not quarreling with anything Judge
18 Breyer said, obviously. I thought it was, you know, very, very
19 well done. I'm just saying that I don't think that decides
20 whether a stay pending appeal should be granted because it's
21 simply a different standard with respect to that ultimate
22 result.

23 So I will issue a written order.

24 With respect to the motion for - to compel, I think
25 that what you need to do is pick up the boxes. And then, you

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1 know, I will give you, you know, a limited period of time to
2 finish the production. Now you haven't gotten the boxes yet.
3 There may have been some confusion as to why that's so. I'm not
4 holding you responsible for that. But, you know, these are the
5 documents that belong to Ms. Hewlett. And there's no reason why
6 you shouldn't take them. And then, you know, make - make - then
7 you have the material to complete your response.

8 So I think we just need to pick a date to pick them up
9 and the date to make the response.

10 MR. FILLERUP: The boxes are at my office -

11 THE COURT: They can pick them up any time, right?

12 MR. FILLERUP: - and they can pick them up this
13 morning.

14 THE COURT: Why don't we just pick a date for the
15 response and you can pick them up when you want, as long as you
16 just let him know. Ten boxes probably won't fit - what kind of
17 car do you have?

18 MR. ATTRIDGE: This is also not a good time for me to
19 be doing that, if only because my annual Christmas party is on
20 Saturday and -

21 THE COURT: Well, then why don't you pick them up -

22 MR. ATTRIDGE: - I will not be working the next day
23 and a half.

24 THE COURT: Why don't you pick them up Monday; will
25 that were?

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1 MR. ATTRIDGE: I'm just trying to -

2 THE COURT: Where's your office again? You're in Mill
3 Valley, right?

4 MR. ATTRIDGE: No, no. I'm -

5 THE COURT: You're in the city, okay.

6 MR. ATTRIDGE: I'm at Civic Center.

7 THE COURT: So you're at - okay, Civic Center.

8 MR. ATTRIDGE: And it wouldn't -

9 THE COURT: And where are you folks?

10 MR. FILLERUP: I'm down by the Ferry Building. Rincon
11 Center, near the Ferry Building.

12 THE COURT: Okay.

13 MR. ATTRIDGE: Yeah. I mean I have to go by with a
14 car. I may have to make a few trips on the subway. I don't
15 know how I'm going to do it. She may drive me over, probably
16 most likely.

17 THE COURT: Okay. It sounds like - 20 boxes would fit
18 in a van or SUV, or something like that probably. These are
19 regular -

20 MR. FILLERUP: They're -

21 THE COURT: - regular document boxes, just -

22 MR. FILLERUP: They're - they are ten boxes and they
23 fit in my car with -

24 THE COURT: Ten boxes?

25 MR. FILLERUP: Ten boxes.

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1 THE COURT: Oh, okay.

2 MR. FILLERUP: Yeah. And they fit in my car, so -

3 THE COURT: And what do you have?

4 MR. FILLERUP: I just - I have a small Audi.

5 THE COURT: Okay. All right. Well, I'm sure you
6 could get like a six in a normal trunk and then some in the
7 backseat, so.

8 MR. ATTRIDGE: Well, if I have to make two trips I'll
9 make two trips.

10 THE COURT: Okay. So why don't you do it Monday. And
11 then -

12 MR. ATTRIDGE: Which will make me an overdressed
13 moving man.

14 THE COURT: You can send somebody from your office.
15 I'm not making you do it personally.

16 All right. And then how about the production: Two
17 weeks from tomorrow.

18 MR. FILLERUP: Okay.

19 THE COURT: Now what day is that? I don't want to...

20 MR. FILLERUP: December 14.

21 THE COURT: Is that okay? I think that makes sense.

22 MR. ATTRIDGE: I think 14 is a Saturday, isn't it?

23 THE COURT: No, the 14th is a Friday.

24 MR. ATTRIDGE: A Friday, okay.

25 THE COURT: Friday. Somebody wanted me to do a trial

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1 on the 15th, a Saturday. We declined. A complicated case
2 involving people who had to travel from New York.

3 MR. FILLERUP: And at the last hearing on November 16
4 the Court issued an order as to the Sierra part of the motion to
5 compel. And the Court indicated -

6 THE COURT: Is this Mr. Sierra?

7 MR. SIERRA: Yes.

8 THE COURT: Okay.

9 MR. FILLERUP: The Court indicated that Mr. Sierra
10 should produce documents by December 13. And I suggest that we
11 just amend the Court's order from November 16 to give Mr. Sierra
12 until December 14 also, to comply with the order -

13 THE COURT: I understand you're kind of doing this
14 together.

15 MR. ATTRIDGE: We have obtained documents from him, -

16 THE COURT: Okay.

17 MR. ATTRIDGE: - which we believe are responsive -

18 THE COURT: Okay.

19 MR. ATTRIDGE: - to the request.

20 THE COURT: Well, why don't I just give you - so
21 there's no reason why they couldn't be done by the 14th.

22 MR. ATTRIDGE: That he would - yes.

23 MR. SIERRA: I sent a summons to Prudential Reality,
24 so - the Legal Department.

25 THE COURT: To what?

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1 MR. ATTRIDGE: Oh, he - he is attempting to get
2 coverage through his employer because of the allegations of the
3 fiduciary - breach of the fiduciary duty, there might be an
4 obligation of his former employer under the Labor Code to pick
5 up a defense for him. In other words, get him a lawyer. So -

6 MR. FILLERUP: I think that's -

7 THE COURT: Okay.

8 MR. FILLERUP: - that's a different question from
9 getting documents.

10 MR. ATTRIDGE: Yeah, that's -

11 THE COURT: That's a different questions from
12 producing documents from a witness.

13 MR. ATTRIDGE: Yeah. I know, that's -

14 THE COURT: Okay. Well, it sounds like that's just
15 about ready. Let's just make them the same day.

16 MR. ATTRIDGE: Okay.

17 THE COURT: In other words, we don't even know - we'll
18 just note it in the order in the record here that you stipulate
19 that the 14th is good rather than the 13th.

20 MR. FILLERUP: Okay.

21 THE COURT: Okay?

22 MR. FILLERUP: And then shall I - with respect to the
23 motion to compel, shall I upload an order? I will submit a
24 proposed order to Mr. Attridge and then -

25 THE COURT: Yeah, why don't you do that. And then

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1 just put the 14th in there for both of them.

2 MR. FILLERUP: All right. And so -

3 THE COURT: And you can pick them up, you can pick up
4 these boxes any time - any time you want. Obviously I've
5 thought of, by making the response date the 14th, that you will
6 not pick them up until Monday. That's at your convenience.

7 MR. ATTRIDGE: Yes.

8 THE COURT: That's for your convenience, okay.

9 MR. FILLERUP: And then the Court will be preparing
10 the order with respect to the motion to stay -

11 THE COURT: I will do the order on the stay, yes.

12 MR. FILLERUP: Okay.

13 THE COURT: Right. All right.

14 Now - and we - do we have any other trial schedule
15 set; have we done that already?

16 MR. FILLERUP: No, we don't have a trial date set.

17 THE COURT: At some point we need to set a trial date.
18 Are you - do you need to do - do you need to see a little bit
19 more of what you get first?

20 MR. FILLERUP: Well, yes. I haven't received any
21 documents yet, so I would like to get documents and some
22 discovery responses before we set a trial date. It may be a
23 good idea today to set a status conference.

24 THE COURT: A status conference, yeah. And then -

25 MR. ATTRIDGE: Actually an attorney named Bertram

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1 Schafer (phonetic) has contacted me and will accept service of
2 process on behalf of Mr. Koopman. I have third-party complaint,
3 so we -

4 THE COURT: I don't remember who Mr. Koopman is. I'm
5 sorry.

6 MR. ATTRIDGE: Mr. Koopman is the old fellow who -

7 THE COURT: Oh, yeah.

8 MR. ATTRIDGE: - approached the bench a few times. He
9 is the holder of one of the seconds and we have I'll either a
10 crosscomplaint or a third-party complaint against him. And so
11 his lawyer would have to be at that. I'll take the laboring oar
12 and tell the guy when that is.

13 THE COURT: Well, has he been served yet?

14 MR. ATTRIDGE: No. He has agreed to accept service.
15 I just have to lick a stamp and send it to him.

16 THE COURT: Okay. I think what you need to do then,
17 let's just set a date. And I will issue an order on that. And
18 you can just serve him with a copy of the order.

19 MR. ATTRIDGE: Sure.

20 THE COURT: It'll be - it'll be in the docket.

21 Now when she we do this? Should it be very early in
22 the New Year or do you want to try to do it like on the 21st?

23 MR. FILLERUP: I think it should be some time in
24 January, early January.

25 THE COURT: Okay. Now I have - can I see the

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1 schedule? I have a trial that's starting - it's going to take
2 most of the first two weeks. And I've even cleared the - which
3 case is this, by the way?

4 (The Court and Clerk confer off record.)

5 MR. FILLERUP: That's my case on January 3.

6 THE COURT: Is this the fraudulent conveyance?

7 MR. FILLERUP: No. It's - it's a claim by - by some
8 of the individuals who were allegedly defrauded by the debtor,
9 so -

10 THE COURT: So this is - you're disputing a claim?

11 MR. FILLERUP: Correct. It's -

12 THE COURT: Okay.

13 MR. FILLERUP: It's an objection to a proof of claim.

14 THE COURT: Okay.

15 MR. FILLERUP: And I had settled one of those similar
16 claims made by claimants by the name of Shoop (phonetic). And
17 this claim is by a claimant by the name of Scott.

18 THE COURT: Okay.

19 MR. FILLERUP: And -

20 THE COURT: The point is I'm just doing that
21 Wednesday, Thursday, and Friday of the first week. So -

22 MR. FILLERUP: And I'm in the process of trying to
23 negotiate a settlement.

24 THE COURT: Okay.

25 MR. FILLERUP: And you may recall that that Shoop

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1 claim we were able to settle. They have the same counsel.

2 THE COURT: Okay.

3 MR. FILLERUP: Shoop and Scott have the same counsel
4 and I'm trying to settle that.

5 THE COURT: You - okay. You may or may not settle it.
6 I am not doing anything except that trial up through the, I
7 guess it's, the 4th. I'm doing - I have everything cleared for
8 Wednesday, Thursday, and Friday, the 2nd, 3rd, and 4th. But I
9 am having status conferences, things on Monday, the 7th, and on
10 Friday, the 11th. So I'm only trying to tell you what days are
11 available. And those are the first days available in January.

12 MR. FILLERUP: January 7 is better for me.

13 MR. ATTRIDGE: They're equally fine.

14 THE COURT: Okay. So let's put that on at, say,
15 11:00, okay?

16 MR. FILLERUP: 11:00's fine.

17 THE COURT: At eleven o'clock. And, again, I will
18 issue a status conference order. So you're going to do an
19 amended order regarding the motion to compel. I will do the
20 order regarding the stay. And I will just do a status
21 conference order, but basically it's just going to stay there's
22 a status conference on this date. One of the reasons I'm doing
23 it in a written order is so if you wind up serving a third-party
24 complaint on Mr. Koopman, you can just forward that order and
25 let them know about that order so that they come that day also.

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1 I assume that you will serve before then?

2 MR. ATTRIDGE: Yes.

3 THE COURT: Okay.

4 MR. ATTRIDGE: There's one other - I'm going to filing
5 a motion for relief from stay because Ms. Hewlett is a
6 co-defendant in a lawsuit filed against Mrs. Ng by a tenant,
7 Martin Yee. The superior court -

8 THE COURT: Co-defendant, okay.

9 MR. ATTRIDGE: Okay? One of the tenants sued both
10 Mrs. Ng and Mrs. Hewlett for treating him bad - badly, okay.
11 The superior court takes the position that the automatic stay
12 does not apply insofar as it prevents the Court from Mr. Yee
13 pursuing his suit against Ms. Hewlett. Even though she's a
14 co-defendant Mrs. Ng doesn't have to show up because of the
15 stay, but it doesn't have any effect on the overall thing. So
16 what I would need is - is relief from it so we can file a
17 crosscomplaint against Mrs. Ng. In order to have that all the,
18 you know, indispensable parties present at that trial, it's -

19 THE COURT: When was the action filed?

20 MR. ATTRIDGE: Oh, and I'm not counsel of record in
21 that case either.

22 MS. HEWLETT: November of '06.

23 MR. ATTRIDGE: November of '06.

24 THE COURT: Ah. Okay, well, there are all sorts of
25 various ways to think about that. As I recall, - I don't know

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1 really – the plaintiff sued both of them.

2 MR. ATTRIDGE: The plaintiff sued both of them. They
3 are co-defendants.

4 THE COURT: Okay.

5 MR. FILLERUP: This is apparently a current tenant at
6 1385 Clay.

7 THE COURT: Uh-huh.

8 MR. FILLERUP: And my understanding is there's an
9 insurance company defending the case.

10 MS. HEWLETT: (Indecipherable.)

11 THE COURT: For the debtor?

12 MR. SIERRA: No, the insurance company doesn't take
13 care. Refused.

14 THE COURT: Okay. Well, you'll have to – you file
15 your motion. You'll have to look into this. There's all sorts
16 of different ways of dealings with it. It may be covered by –
17 the defense may be covered by insurance. I mean it'd just be a
18 claim.

19 MR. ATTRIDGE: The defense of Ng is covered by
20 insurance. They're refusing to indemnify her, even though she
21 paid the premiums –

22 THE COURT: Well, but if the defense is – of Ms. Ng is
23 covered by insurance, then the Trustee might stipulate to relief
24 from stay to allow the claim to be liquidated.

25 MR. FILLERUP: This is the first that we've heard of

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1 this claim, so -

2 THE COURT: Yeah. I know. They need to look into it.
3 The point is their - the point is that file your motion. There
4 are lots of things that can be done to enable this to were
5 properly, okay, one of which is the estate's interest in this is
6 making sure that the claims are - against the estate are, one,
7 defended and, two, defended in a way that is relatively
8 economical for the estate.

9 If the defense is covered by insurance, then it may be
10 appropriate to just allow the state court to liquidate it, but
11 they need to look into the situation. So you file your motion,
12 and they'll respond.

13 MR. FILLERUP: Okay.

14 THE COURT: But I understand what you're getting at.

15 Okay. And it may - it may - what I was looking at is
16 I'm trying to remember whether... Well, let's just deal with it
17 that way. I mean there's - it might conceivably be removable,
18 too. That's all I'm just generally -

19 MR. ATTRIDGE: Removable to here?

20 THE COURT: Yeah, because it's in part a claim against
21 the debtor.

22 MR. ATTRIDGE: Even though it's a year old?

23 THE COURT: Well, that's the question. I think
24 there's - there may be a provision in there to the extent that
25 when relief from stay is granted, or something like that - I

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1 can't remember how the timing works for the removal.

2 In any case, file your motion; they'll respond, okay?

3 MR. ATTRIDGE: Okay. So -

4 MR. FILLERUP: Thank you.

5 THE COURT: I don't think that would be the best way
6 to deal with it. I think if their insurance is covering it,
7 that would be the best way to deal with it.

8 Okay. All right.

9 THE CLERK: All rise.

10 (The hearing was adjourned at 11:07 a.m.)

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State of California)
) SS.
County of San Joaquin)

I, Susan Palmer, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the digital recording provided to me by the United States Bankruptcy Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am not a party to nor in any way interested in the outcome of this matter.

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Dated December 12, 2007